

ARKANSAS SUPREME COURT

No. CR 06-1095

NOT DESIGNATED FOR PUBLICATION

WILLIAM PUGH, JR.
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered November 9, 2006

PRO SE MOTION FOR BELATED
APPEAL OF JUDGMENT [CIRCUIT
COURT OF MISSISSIPPI COUNTY,
OSCEOLA DISTRICT, CR 2004-54,
HON. VICTOR HILL, JUDGE]

MOTION GRANTED; PETITIONER
DECLARED INDIGENT AND
COUNSEL APPOINTED.

PER CURIAM

On March 10, 2006, judgment was entered reflecting that petitioner William Pugh, Jr., had been found guilty by a jury of fleeing and misdemeanor possession of a controlled substance. He was sentenced as a habitual offender to an aggregate term of 144 months' imprisonment. Petitioner was represented at trial by his retained attorney Bill Stanley. No appeal was taken from the judgment, and petitioner now seeks leave from this court to proceed with a belated appeal. Appended to the motion is petitioner's request to be declared a pauper with his affidavit of indigency attached. He asks that the record for the appeal to be brought up at public expense. The State has not filed a response taking issue with the assertion that petitioner is now indigent.

Mr. Stanley has filed an affidavit in response to the motion in which he avers that he advised petitioner and his family against taking an appeal because there would be no meritorious ground for reversal of the judgment. He further states that he also advised them that additional attorney's fees and costs would be incurred for the appeal, which would in all likelihood be wasted money.

Petitioner claims that he asked Mr. Stanley to appeal on the date the judgment was entered, and Mr. Stanley does not contradict that assertion, stating that immediately after sentencing he discussed whether to appeal with petitioner and his family.

Petitioner has included with his motion a copy of a letter from Mr. Stanley to him dated May 31, 2006. Mr. Stanley states in his affidavit that he stands by the contents of the letter. In the letter, Mr. Stanley informs petitioner, “I told you following your trial that I would not file a Notice of Appeal on your behalf absent your paying my attorney’s fee.” He further informs petitioner that any appeal would be without merit and that, “I refused to file an appeal . . .because you never paid me and candidly would not have paid me to file an appeal.”

Rule 16 of the Rules of Appellate Procedure--Criminal provides in pertinent part that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. It is well settled that under no circumstances may an attorney who has not been relieved by the court fail to preserve an appeal when the convicted defendant desires to appeal. *Johnson v. State*, 342 Ark. 709, 30 S.W.3d 715 (2000) (*per curiam*); *Langston v. State*, 341 Ark. 739, 19 S.W.3d 619 (2000) (*per curiam*); *Ragsdale v. State*, 341 Ark. 744, 19 S.W.3d 622 (2000) (*per curiam*); *Mallett v. State*, 330 Ark. 428, 954 S.W.2d 247 (1997)(*per curiam*); *Muhammed v. State*, 330 Ark. 759, 957 S.W.2d 692 (1997) (*per curiam*); *James v. State*, 329 Ark. 58, 945 S.W.2d 941 (1997) (*per curiam*); *Jackson v. State*, 325 Ark. 27, 923 S.W.2d 280 (1996) (*per curiam*).

When the judgment is entered in a criminal case and the trial attorney is made aware by the convicted defendant that the defendant desires to appeal within the thirty-day period from the date

of judgment allowed by Ark. R. App. P.–Crim. 2(a) for filing a notice of appeal, counsel is obligated to timely file a notice of appeal. *Spillers v. State*, 341 Ark. 749, 19 S.W.3d 35 (2000) (*per curiam*).

The obligation to preserve the appeal exists even if counsel believes the appeal to be meritless. *James, supra*. Counsel who is made aware of his or her client’s desire to appeal and who deems the appeal to be entirely without merit must file a timely notice of appeal, lodge the record in the appropriate appellate court, and comply with Ark. Sup. Ct. R. 4-3(j)(1). Rule 4-3(j)(1) requires counsel to file a motion to be relieved on the ground that the appeal is wholly without merit and submit a brief that complies with the procedure set out in *Anders v. California*, 386 U.S. 738 (1967).

The obligation to preserve the appeal also exists if retained counsel believes the appellant is indigent and cannot pay the costs of the appeal or if counsel believes the appellant to be capable, but unwilling, to pay the costs of the appeal. When an attorney desires to be relieved of the responsibility for an appeal because the appellant will not pay the costs or the attorney desires to have his client declared indigent, counsel’s course of action must be an appropriate motion or motions filed here with a partial record.¹

In the instant case, Mr. Stanley was not relieved by the trial court and clearly knew of petitioner’s desire to appeal. He was thus obligated to represent petitioner until such time as he was permitted by the trial or appellate court to withdraw pursuant to Ark. Sup. Ct. R. 4-3(j)(1). Mr. Stanley did not act to protect appellant’s right to appeal, and appellant was left without the effective

¹If retained counsel is aware at the time the notice of appeal is filed that his client is indigent, the notice of appeal shall include a petition to obtain the record as a pauper if, for the purposes of the appeal, a transcript is deemed essential to resolve the issues on appeal. Ark. R. App. P.–Crim. 2(c)(2).

appellate representation guaranteed to a convicted criminal defendant by the Sixth Amendment. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987). The failure to preserve the right to appeal was clearly error. The direct appeal of a conviction is a matter of right, and a State cannot penalize a criminal defendant by declining to consider his or her first appeal when counsel has failed to follow mandatory appellate rules. *Franklin v. State*, 317 Ark. 42, 875 S.W.2d 836 (1994); *see Evitts v. Lucey*, 469 U.S. 387 (1985).

For the reasons set out in this opinion, we grant the motion for belated appeal. Petitioner is declared indigent for the purposes of this appeal, and Mr. Stanley is appointed to represent him on appeal. Our clerk is directed to lodge the appeal with Mr. Stanley as attorney-of-record. Mr. Stanley is directed to file within fifteen days a petition for writ of *certiorari* to bring up the remainder of record, or that part of it, necessary for the appeal.

There is no need to require Mr. Stanley to admit fault in this matter as the record plainly shows him to be at fault. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004).

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion granted; petitioner declared indigent and counsel appointed.

Glaze, J., not participating.